Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. RONALD LYNCH,
HOWARD, STEVENS, LYNCH,
CAKE & HOWARD, P.C.
128 North Pitt Street
Alexandria, Virginia 22314
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX TO CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Statement of Facts	3
Reasons for Granting the Writ	5
A. 18 U.S.C. § 922(a)(1) Is Unconstitutionally Vague	5
B. The Circuit Court Construed the Elements Required To Convict Under § 922(a)(1) Differently from the Instructions of the Trial Court and Erred in Not Remanding for a New Trial with Instructions Complying with Their Definition	12
C. The Evidence Is Insufficient To Convict the Defendant Beyond a Reasonable Doubt Because There Is No Evidence of Defendant's Participating in the Alleged Transaction Because of Profit or Profit Motives	15
Conclusion	20
Appendix	1a

TABLE OF CASES

	Page
Grayned v. *City of Rockford*, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972)	7, 8
Lanzetta v. *State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939)	11
Mullaney v. *Wilbur*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (June 9, 1975)	13
U.S. v. *Gross*, 451 F.2d 1355 (7th Cir., 1971)	8, 9, 10, 15
U.S. v. *Jackson*, 352 F. Supp. 672 (S.D. Ohio, 1972)	9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Calvin Eugene Huffman, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 5, 1975.

OPINION BELOW

The Opinion of the Court of Appeals below (Appendix, *infra*) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals below was entered on June 5, 1975 (Appendix). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

A. Whether 18 U.S.C. § 922(a)(1) is unconstitutionally vague.

B. Whether the Circuit Court erred in not remanding for a new trial under its construction of the elements of 18 U.S.C. § 922(a)(1).

C. Whether the evidence is insufficient to convict the defendant beyond a reasonable doubt because there was no proof of profit or profit motive.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution.

Statutes

18 U.S.C. § 921(a)(11):

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, and (B) any person engaged in the business of repairing or making or fitting special barrels, stock or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

18 U.S.C. § 922(a)(1):

> Section 922. Unlawful acts.
>
> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

STATEMENT OF THE CASE

Petitioner Huffman was indicted at the June, 1974, Term of the Grand Jury for the Eastern District of Virginia sitting at Newport News, Virginia. The indictment charged him with one count of dealing in firearms in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a). (A. 1).

Subsequently, trial was had before a jury, the Honorable Albert V. Bryan, Jr., District Judge, presiding, on July 23, 24, and 25, 1974. The jury returned a verdict of guilty. Judge Bryan imposed a sentence of two years on Huffman on August 30, 1974. (A. 2).

On appeal to the United States Court of Appeals for the Fourth Circuit, Petitioner's conviction and sentence was affirmed. (App. 1-3).[1]

STATEMENT OF FACTS

The bulk of the Government's case consisted of the testimony of three of Sgt. Huffman's fellow Marines that he participated in various transactions in firearms with them between April and December, 1973. The bulk of these transactions were purportedly with Sgt. Larry Kirkwood whom Huffman met in April of 1973, when Sgt. Huffman was in charge of the gunnery range at Quantico. Sgt. Kirkwood had been detailed to the gunnery range for annual marksmanship training. Sgt. Kirkwood testified that when he first met Sgt. Huffman, he went to Huffman's home and saw a large

---

[1] App. is the Appendix of this Petition.

A. is the Appendix submitted on Appeal to the Circuit Court.

quantity of ammunition. Kirkwood testified that on April 29, 1973, he obtained 7 cans of ammunition from Sgt. Huffman and in return, gave Sgt. Huffman a .308 rifle which Kirkwood had obtained by trading 2 cans of the .45 ammunition to a dealer. According to Kirkwood, on September 6, 1973, he gave 3 .45 pistol frames to Sgt. Huffman to be built into complete pistols in return for a reel to reel recorder and picked up the pistols between 10 and 21 September 1973. On September 8, 1973, according to Kirkwood's testimony, he picked up approximately 16 cans of ammunition from Sgt. Huffman's house and subsequently purchased a .22 pistol which he delivered to Huffman in payment for the ammunition. (A. 3-9). Sgt. Kirkwood testified that on September 29, 1973, he picked up two more .45 pistol frames and delivered them to Sgt. Huffman to be built into complete pistols. He stated that he gave him a P-38 Walther automatic in payment for that service. Kirkwood further testified that he obtained ammunition on two more occasions in October of 1973, but did not testify as to any payment that was made for the ammunition on those occasions. (A. 34, 39-42).

Sgt. Huffman testified in his own behalf and denied that he had ever had a large quantity of ammunition stored at his house or that he sold such ammunition to Kirkwood. He testified as to the transactions involving firearms in which he participated with Kirkwood. The first transaction involved the P-38 pistol which Kirkwood testified that he had given Sgt. Huffman in payment for building weapons. Sgt. Huffman testified that Sgt. Kirkwood asked him to help sell the pistol and that he contacted Sgt. Mace and helped arrange the sale of the pistol for Kirkwood. He further testified that he obtained the .308 Remington rifle for Kirk-

wood to use in hunting season and he later sold this rifle to Sgt. Mace because he was not satisfied with the weapon. Sgt. Huffman also testified that he kept a number of empty ammunition cans in a shed behind his house in which he kept tools and other items. (A. 39-45).

Sgt. Mace testified that he did trade Sgt. Huffman two .45 receivers for a P-38 pistol which the Sgt. was trading for a third person. He also testified that he purchased in November and December of 1973, three rifles from Sgt. Huffman. He further testified that he sold one of the rifles to Cpl. Ross for exactly the same price that he had paid for the weapon. He further testified that he has only one of the weapons he purchased from Sgt. Huffman and that he sells weapons from time to time and does not see anything wrong with Sgt. Huffman's conduct in their dealings. (A. 15-21).

Lt. Ybarbo testified that in November of 1973, he purchased a 357 magnum pistol from Sgt. Huffman. He further testified that he never saw Sgt. Huffman selling any other weapons. The Lieutenant purchased the weapon when he saw Sgt. Huffman firing it at the firing range and asked him if he could purchase the weapon. Sgt. Huffman had purchased the weapon for $133.50 and sold the weapon plus a box of ammunition to Lt. Ybarbo for $130.00 in the same month in which it had been purchased. (A. 22-24, 45-47).

REASONS FOR GRANTING THE WRIT

A. 18 U.S.C. § 922(a)(1) Is Unconstitutionally Vague.

Sgt. Huffman was convicted of "dealing" in firearms in violation of 18 U.S.C. § 922(a)(1). Nowhere

in Section 922 or any place else in the Code is the term "dealing" defined. This argument will show that the statute is so vague that Sgt. Huffman or any defendant acting in a similar manner was not informed what conduct would render them liable to the penalties imposed for violation of Section 922 and that Section allows arbitrary and discriminatory enforcement.

18 U.S.C. § 922(a)(1) reads as follows:

> Section 922. Unlawful acts.
>
> (a) It shall be unlawful—
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

18 U.S.C. § 921(a)(11) defines "dealer" as follows:

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, and (B) any person engaged in the business of repairing or making or fitting special barrels, stock or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

The phrase applicable in the present case is whether or not the defendant was "in the business of dealing in firearms or ammunition". The statute does not further define this vague and ambiguous phrase by defining specific amounts of sales necessary to be dealing or in any way particularly describing the course of conduct which constitutes dealing in firearms.

The principles governing whether a statute or ordinance is vague have been stated many times and were recently restated in *Grayned* v. *City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222, 92 Sup. Ct. 2294, which states at page 108:

> It is a basic principle in due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trip the innocent by not providing fair warning. Second, if an arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The present statute does not give the person of ordinary intelligence a reasonable opportunity to know what is prohibited. There are many questions not answered by the standard laid down by the applicable statute, such as: the amount of firearms or ammunition one must sell to be "dealing", the amount of time over which the transactions must take place, the permissibility of disposing of guns or ammunition one owned prior to the passage of this law, whether or not one can use one's connections or acquaintances to obtain a firearm or have one built or repaired for another friend or acquaintance. It would seem evident that any law that leaves these many questions unanswered does not give

a person of ordinary intelligence a reasonable opportunity to know what it prohibited.

The extent to which the present law delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* basis is shown within existing precedent concerning this law and the record of this case. Sgt. Mace was called as a witness for the prosecution and testified that he had purchased or traded for three weapons which he obtained from Sgt. Huffman. He testified that he traded two 45 receivers for one weapon and paid cash for the other weapons. On cross-examination he testified that he had resold two of the three weapons which he procured from Sgt. Huffman and that he bought and sold other weapons from time to time. (A. 15-20).

By his own testimony Sgt. Mace has been involved in several weapons' transactions, but he has not been prosecuted as a "dealer". Apparently Sgt. Mace is on one side of whatever imaginary line the U.S. Attorney has drawn in the prosecution of these cases, but Sgt. Huffman falls on the other side of the line and is thought to be a "dealer". Sgt. Huffman had no way of knowing what the U.S. Attorney's criteria was to determine what constitutes dealing, and any such criteria is arbitrary, discriminatory and vague as defined by *Grayned, supra.*

The vagueness of the statute is further shown by the fact that the Court in the present case and other Courts have adopted totally different approaches toward defining when one is "in the business of dealing in firearms". *U.S.* v. *Gross,* 451 F.2d 1355 (7th Circ. 1971), involved a prosecution under 18 U.S.C. § 922 (a)(1) as does the present case. The Court defined

the conduct prohibited by the statute at page 1357: "There appears to be little doubt that 'dealer' means anyone who is engaged in any business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit. This was the definition adopted by the Fourth Circuit on Appeal of the instant case. (App. 2)

In *U.S.* v. *Jackson,* 352 F. Supp. 672 (S.D. Ohio 1972), the Court also was dealing with a case brought under 18 U.S.C. § 922(a)(1). The Court rejected the definition given in *U.S.* v. *Gross, supra,* and adopted its own definition at p. 674, as follows: "We conclude that anyone is engaged in the business of dealing in firearms if they have guns on hand or are ready and able to procure them, and either case for the purpose of selling some of them to such persons as they might from time to time conclude to accept as customers."

The trial Court in the present case instructed the jury as follows, regarding the question of whether or not the defendant was engaged in the business of dealing in firearms or ammunition:

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms 'built up' or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;

The frequency of these transactions;

The purpose for which the firearms or ammunition was owned or possessed by the defendant;

The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.

A person who collects firearms for his own use or enjoyment and toward that purchase [sic] occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.

Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.

It is not necessary for the Government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the Government.

It need not be his only business, but the test is: was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?

To be a sale, of course, the transfer of ammunition or commodity need not be for cash. It can be for a commodity.

If, for example, as contended by the Government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun this would constitute a sale. (A. 62-65).

It can be readily seen that these three Courts have taken totally different approaches in interpreting § 922 (a)(1). The definition in *U.S.* v. *Gross, supra,* requires that a defendant devote time and labor to the sale of the weapons with the purpose of obtaining a profit.

The Court in *U.S.* v. *Jackson, supra,* requires the defendant have guns or access to them and be willing to sell them.

The thrust of the trial Court's instructions in the present case is that what constitutes "business of dealing in firearms" depends entirely upon the circumstances. It is not necessary that a profit be made, profit motive be present or for the Government to prove any specific number of transactions. It appears to be a crime with a number of elements, no one of which is necessary for conviction and no particular combination thereof is necessary for conviction.

The learned and able trial Judge in the present case and in the cases cited could not reach a common definition as to what constitutes "business of dealing in firearms". The statute is clearly vague and allows Courts and juries to be arbitrary and discriminatory. The Courts involved could not define the conduct prohibited by the statute. How was Sgt. Huffman to know prohibited conduct?

The term "business of dealing in firearms or ammunition" is even more vague than the term "gangster" that was found unconstitutionally vague in *Lanzetta* v. *State of New Jersey,* 306 U.S. 451, 59 Sup. Ct. 618 (1939). The word "gangster" is a more specific and limited word than the word "business". Like the statute involved in *Lanzetta,* the present statute is unconstitutionally vague.

B. The Circuit Court Construed the Elements Required To Convict Under § 922(a)(1) Differently from the Instructions of the Trial Court and Erred in Not Remanding for a New Trial with Instructions Complying with Their Definition.

The Circuit Court defined the offense as follows:

> There appears to be little doubt that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit.—Citations omitted.—Thus, while the Government need not prove an actual profit from the sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by hobbyists. (App. 2).

The trial Court instructed the jury as follows:

> In deciding whether the defendant was in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms "built up" or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;
>
> The frequency of those transactions;
>
> The purpose for which the firearms or ammunition was owned or possessed by the defendant;
>
> The extent to which the defendant devoted time, attention, and effort to the endeavor of selling

> firearms or ammunition or repairing or assembling guns.
>
> A person who collects firearms for his own use or enjoyment and toward that purchase occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.
>
> Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.
>
> It is not necessary for the government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.
>
> It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up a firearms a business as distinguished from a hobby?
>
> To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.
>
> If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale. (A. 63-65).

The Circuit Court below established three elements for being in the "business" of dealing in firearms; "a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist". It is basic in our law that all elements of a crime must be proved beyond a reasonable doubt by the Government. See *Mullaney* v. *Wilbur,* — U.S. —, — S.Ct. —, — L.Ed.2d — (June 9, 1975).

The trial Court's instructions clearly state that the jury may consider whether or not the defendant made

a profit in deciding whether or not he was in the "business" of dealing in firearms. The trial Court instructed that this was one element among many that the jury could consider in making that decision. As far as it goes, the trial Court's instructions are not objectionable. However, the Circuit Court has clearly defined three elements which must be found beyond a reasonable doubt in order to convict the defendant of the instant offense and these elements are not included in the trial Court's instructions. Nowhere in the trial Court's instructions is the jury told that it must find beyond a reasonable doubt that the defendant must have engaged in the alleged transactions with a profit motive, a willingness to deal and a greater degree of activity than occasional sales by a hobbyist.

The trial Court's instructions are as vague as the basic statute and set forth no elements whatsoever for the offense proscribed by 18 U.S.C. § 922(a)(1). The Circuit Court said that under its construction, "the statute is not vague as applied to Huffman". (App. 3). Assuming that under the Circuit Court's construction, the statute is not vague as applied to Sgt. Huffman, he is entitled to be tried under that construction and not the vague standard set by the statute and the trial Court's instructions. If the Circuit Court has correctly construed the statute, the case must be remanded to the District Court to allow the jury to decide beyond a reasonable doubt whether Sgt. Huffman participated in the alleged transactions with a profit motive, a willingness to deal and a greater degree of activity than occasional sales by a hobbyist.

The Circuit Court erred when it did not remand this case to the District Court for a new trial under proper

instructions according to their construction of the crime proscribed in § 922(a)(1).

C. The Evidence Is Insufficient To Convict the Defendant Beyond a Reasonable Doubt Because There Is No Evidence of Defendant's Participating in the Alleged Transaction Because of Profit or Profit Motives.

The term "business of dealing in firearms or ammunition" as used in § 922(a)(1) as indicated in Part A of this brief is unconstitutionally vague, but if it has a definable meaning, it requires that the defendant participate in transactions involving firearms and ammunition with the motive of obtaining a profit.

In the case of *U.S.* v. *Gross,* 451 F.2d 1355 (7th Cir. 1971), the Court construed § 922(a)(1) defining "dealer and business" as follows:

> There appears to be little doubt that "dealer" means anyone who is engaged in any business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit.

In that case, the Court upheld the conviction of the defendant for dealing in firearms in violation of § 922(a)(1) applying the above definition. At page 1357 of the opinion, the Court noted that six of the firearms purchased by the undercover police agent from the defendant had previously been purchased by the defendant from a licensed firearm dealer and that the prices the defendant charged the officer were considerably in excess of the market value of those guns. This evidence gave the Court clear proof that the defendant in that case was making a profit from his transactions. The *Gross* case is clear authority that in order to convict Sgt. Huffman of the instant offense,

the Government had to prove that the transactions in which he participated were profit-making.

The Circuit Court below adopted the *Gross* definition of "dealer" and "business". It went on to more fully delineate the elements of the offense as follows:

> Thus, while the Government need not show an actual profit from sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by hobbyists. (App. 2)

Clearly, the Circuit Court opinion requires a showing of beyond a reasonable doubt that the defendant participated in the alleged transactions for a profit motive.

The Government's evidence would indicate Sgt. Huffman participated in 13 separate transactions in which guns, rebuilt guns or ammunition possessed by him were transferred to another party. In all these transactions, the transferee was a fellow Marine. The majority of these transactions concerned a Sgt. Larry Kirkwood who met Sgt. Huffman in April of 1973. The first alleged transaction between Sgt. Huffman and Sgt. Kirkwood occurred on August 29, 1973. The majority of the alleged transactions were trades for other guns, and in one instance, a tape recorder, rather than cash transactions. (A. 3-24).

Sgt. Huffman took the stand and denied participating in many of the 13 transactions, but at this stage, the conflict in testimony is resolved in favor of the Government. (A. 31-54).

Even taking the Government's evidence at its highest point there is no evidence that Sgt. Huffman was participating in the transactions to make a profit. To the

contrary, the evidence of the Government clearly indicates that Sgt. Huffman was not making a profit in the transactions in which he allegedly participated.

According to the Government's case, the first transaction in which Sgt. Huffman was involved was on August 29, 1973. Larry Kirkwood testified that on that date, he was given 4 cans of .45 ammunition and 3 cans of .308 ammunition by Sgt. Huffman. He further testified that in return for this ammunition he gave Sgt. Huffman a .308 rifle which he had obtained by trading a dealer 2 cans of the same ammunition. The Government introduced no evidence to show the value of the ammunition, the value of the rifle, the price paid for the ammunition, the price paid for the rifle, or the source from which Sgt. Huffman obtained the ammunition. The only legitimate inference to be drawn from the Government's own evidence is that Sgt. Huffman exchanged 7 cans of ammunition for a rifle which was worth 2 cans of ammunition to a dealer and the only profit was made by the other parties to the transactions. (A. 6, 6A).

The Government's witness Kirkwood also testified that in the first part of October, he obtained 8 cans of ammunition from Sgt. Huffman. Neither the witness Kirkwood nor any other Government witness testified that anything had been exchanged for its 8 cans of ammunition. Sgt. Huffman could not have made a profit on this transaction becaust he obtained nothing in return for the ammunition. (A. 12).

Similarly, the Government's witness Kirkwood testified that in the latter part of October, he obtained 6 cans of ammunition and assorted shot-gun shells from Sgt. Huffman. In this transaction, there was no testi-

mony that Sgt. Huffman received anything in return for the ammunition. (A. 13).

The Government's witness, Sgt. Mace, testified that he purchased a Parker Ballard rifle from Sgt. Huffman for $200.00 and sold it on the same day that he purchased it for the same price. There is no evidence as to what Sgt. Huffman paid for the rifle or as to the market value of the rifle other than the sale price. (A. 20, 21).

Lt. Ybarbo testified for the Government that he purchased a 357 magnum from Sgt. Huffman. (A. 23). Sgt. Huffman testified, uncontradicted by any evidence presented by the Government, that he sold the magnum pistol to Lt. Ybarbo because he could not afford the ammunition for the pistol. He sold the pistol and a box of ammunition for $130.00 in the same month he had purchased the pistol for $129.00 plus $4.50 tax. (A. 44, 46).

The Government's own evidence shows that in five out of the thirteen transactions, Sgt. Huffman received no profit on transferring a gun or ammunition. The evidence shows that in the two October ammunition transfers, he received nothing at all in return for the ammunition. The evidence shows that as to the ammunition allegedly transferred to Kirkwood on August 29, 1973, the defendant received a gun worth two cans of ammunition in return for seven cans of ammunition. The evidence shows that the rifle for which Sgt. Mace paid $200.00, he immediately resold for $200.00 indicating the market value of the weapon to be $200.00. There is no proof that Sgt. Huffman paid any less than the market value of the rifle for it. The evidence shows that the 357 magnum pistol purchased by Lt. Ybarbo

was sold to him by Sgt. Huffman and for slightly less than the amount Sgt. Huffman had paid for the same pistol the same month he sold it to the Lieutenant. The only clear inference that can be drawn from these facts is that Sgt. Huffman was not making a profit in the transactions alleged by the Government.

There is no proof that Sgt. Huffman made a profit in the other transactions testified to by the Government's witnesses. No proof was introduced by the Government to show that Sgt. Huffman received cash or items in exchange which exceeded the market value or purchase price of the item allegedly transferred by Sgt. Huffman. All the alleged transactions were with fellow Marines.

The Circuit Court opinion below and *Gross, supra,* require a showing of profit or profit motive before a defendant can be convicted under § 922(a)(1). All the transactions shown by the Government's evidence were with fellow Marines. The Government's own evidence in this case clearly shows that there was no profit made in a number of instances. The Government did not prove Sgt. Huffman made a profit in any instance. The only reasonable inference that can be drawn is that Sgt. Huffman was not in the "business" of dealing in firearms as that term is defined in *Gross, supra,* and by the Circuit Court below. Clearly, the Government did not prove beyond a reasonable doubt that Sgt. Huffman was "dealing" in firearms.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted for the reasons set forth above.

J. RONALD LYNCH,
HOWARD, STEVENS, LYNCH,
CAKE & HOWARD, P.C.
128 North Pitt Street
Alexandria, Virginia 22314

Counsel for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2185

UNITED STATES OF AMERICA, *Appellee,*

v.

CALVIN EUGENE HUFFMAN, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued March 3, 1975 Decided June 5, 1975

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and HALL, District Judge

---

Jack S. Rhoades (Howard, Stevens, Lynch, Cake and Howard on brief) for Appellant; John F. Kane, Assistant United States Attorney, (David H. Hopkins, United States Attorney, and Frederick Sinclair, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Calvin Eugene Huffman was convicted by a jury of engaging in the business of dealing in firearms without being licensed to do so, a violation of 18 U.S.C.A. § 922(a)(1) and § 924(a). We conclude that Huffman's claims on appeal are without merit and affirm.

Huffman contends that Section 922(a)(1) is void for vagueness and that the evidence is insufficient to support his conviction. The statute proscribes dealing in firearms without a license. A dealer is "any person engaged in the business of selling firearms or ammunition at wholesale or retail . . . ." 18 U.S.C.A. § 921(a)(11). "There appears to be little doubt that 'dealer' means anyone who is engaged in *any* business of selling firearms, and that 'business' is that which occupies time, attention and labor for the purpose of livelihood or profit." *United States* v. *Gross*, 451 F.2d 1355, 1357 (7th Cir. 1971) (emphasis in original); *United States* v. *Wilkering*, 485 F.2d 234, 235 (8th Cir. 1973); *United States* v. *Day*, 476 F.2d 562, 567 (6th Cir. 1973). Thus, while the Government need not prove an actual profit from sales of firearms, it must show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist.

So construed, the statute is not vague as applied to Huffman. The Government proved that he engaged in more than a dozen transactions in the course of a few months. He frequently built firearms, or had them rebuilt, and exchanged them for other weapons which he subsequently sold or traded. There was also evidence that he traded large quantities of military ammunition for firearms. The jury was properly instructed to distinguish between a business and a hobby and to consider whether a profit was made. Accordingly, Huffman's conviction under the statute is not lacking in fairness, nor is it unsupported by the evidence.

Similarly without merit is Huffman's claim that the district court erred in refusing to instruct the jury that criminal intent is an essential element of the offense.

> "There is no constitutional requirement that scienter be established as an element of the crime, nor will Congress be presumed from silence to have intended to make it so when the purpose of the statute is to regulate objects or activities which in and of themselves are dangerous or harmful." *United States* v. *Ruisi*, 460 F.2d 153, 156 (2d Cir. 1972).

In this respect Huffman's contention, as Ruisi's, is that he was entitled to acquittal unless he knew his activity was unlawful and had an affirmative intention to violate the statute. Of course, he was entitled to no such instruction in this prosecution for violation of a statute regulating "activities which in and of themselves are dangerous or harmful."

No. 75-18

Supreme Court, U. S.
FILED
SEP 13 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

CALVIN EUGENE HUFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 922(a)(1), which prohibits dealing in firearms as a business without a license, is unconstitutionally vague, that the trial court's instructions to the jury did not adequately state the elements of the offense, and that the evidence was insufficient to support his conviction.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). He was sentenced to two years' imprisonment, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. 1a-3a).

The evidence showed that in April 1973 petitioner, who was the sergeant in charge of the base rifle range at the Marine Corps Air Station in Quantico, Virginia, invited Sgt. Larry Kirkwood to his house, showed him several weapons, and told him that "he had access to almost any quantity of 45 weapons and ammunition * * * " (Tr. 18-19).[1]

During August and September 1973, Kirkwood and petitioner engaged in a number of transactions involving the purchase and sale of firearms, firearm parts, and ammunition. On August 29, Kirkwood obtained from petitioner four cans of .45 caliber ammunition and three cans of .308 caliber ammunition which he used to obtain a rifle for petitioner (Tr. 20-24). On September 6, Kirkwood purchased three Essex pistol frames, which petitioner then built into pistols for him (petitioner had all the necessary parts except the frames), in return for a tape recorder (Tr. 26-28).

On September 8, Kirkwood and his brother James obtained a large quantity of ammunition from petitioner, which they took to West Virginia in a rented truck. The following day, after talking to petitioner, Kirkwood, apparently in payment for the ammunition, purchased a chrome plated .22 magnum pistol for petitioner (Tr. 29-31, 96). Later in the month he similarly purchased a Remington rifle for petitioner. During September and October 1973, petitioner also sold Kirkwood a .45 caliber pistol for $100, built up two additional .45 frames for him in return for another weapon, and transferred additional ammunition to him (Tr. 34-36, 38-42). Petitioner told Kirkwood that he wanted to get rid of the ammunition because he felt that "the heat was * * * on" and a certain "Jack" "was going to rat on him" (Tr. 83).

---

[1]Tr. refers to the transcript of the trial. Sgt. Kirkwood testified for the United States.

Petitioner engaged in numerous transactions with persons other than Kirkwood, primarily involving pistol parts (Tr. 123-124, 151-153). In September 1973, Sgt. Michael Mace heard that petitioner had a Walther P-38 pistol for sale. He spoke to petitioner, who said that he was selling it for someone else who wanted two .45 receivers for it. Mace traded two receivers for the P-38 (Tr. 172-173). One of these receivers was ultimately built up into a .45 pistol, which Kirkwood's brother sold to federal undercover agents in West Virginia (Tr. 97-98).[2]

1. Petitioner contends that 18 U.S.C. 922(a)(1)[3] is unconstitutionally vague in that it does not provide a sufficient standard to determine when one is "engage[d] in the business of * * * dealing" in firearms or ammunition.

18 U.S.C. 921(a)(11) defines "dealer" as follows:

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

---

[2]For other of petitioner's dealings in firearms, see Tr. 173-174, Gov't. Ex. 5, Tr. 23-24, 174-176, 183-185, 191-193. In several of these instances petitioner required purchasers to fill out federal firearms forms (Tr. 176, 183-185).

[3]18 U.S.C. 922(a)(1) provides:

> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce * * *.

In light of this definition of "dealer," Section 922(a)(1), in proscribing "engag[ing] in the business of * * * dealing in firearms or ammunition," establishes a standard sufficiently certain to apprise a person of ordinary intelligence of the conduct that is prohibited.

The courts of appeals that have ruled on the issue have all held that Section 922(a)(1) is not unconstitutionally vague. See *United States* v. *Wilkening*, 485 F.2d 234, 235 (C.A. 8); *United States* v. *Day*, 476 F.2d 562, 567 (C.A. 6); *United States* v. *Gross*, 451 F.2d 1355, 1357-1358 (C.A. 7); *United States* v. *Jackson*, 352 F. Supp. 672, 673-674 (S.D. Ohio), affirmed, 480 F. 2d 927 (C.A. 6); see also, *United States* v. *Williams*, 502 F.2d 581, 583 (C.A. 8); *United States* v. *Zeidman*, 444 F.2d 1051, 1054-1055 (C.A. 7). Most of these decisions, recognizing that there is no express statutory definition for the phrase "engage in the business," have adopted the standard enunciated by the Seventh Circuit in *United States* v. *Gross*, *supra*, 451 F.2d at 1357:

> There appears to be little doubt that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit. [Citation omitted.]

However, the decision of the district court in *United States* v. *Jackson*, *supra*, which was affirmed by the Sixth Circuit without published opinion, after stating the *Gross* standard, took a slightly different view of the meaning of "engage in the business" (352 F. Supp. at 674):

> In view of the purpose of the Gun Control Act of 1968 to assist crime control, we conclude that anyone is engaged in the business of dealing in firearms if they have guns on hand or are ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as they might from time to time conclude to accept as customers.

The only difference between the two definitions appears to be that the *Gross* definition specifically requires the government to prove that a defendant's dealings in firearms were "for the purpose of livelihood or profit." In light of the statutory purpose of controlling crime by regulating firearms transactions,[4] the *Jackson* definition of the phrase "engage in the business" in our view more accurately reflects the intent of Congress.

But the court of appeals in the instant case adopted the more stringent *Gross* standard and held that the government was specifically required to prove a profit motive (Pet. App. 2a). The government did so, and petitioner presents no reason for review in complaining (Pet. 5-11) that the court of appeals held the government to a stricter standard of proof in his case than might be imposed in another circuit.

2. Petitioner further contends (Pet. 12-15) that in light of the court of appeals' holding with regard to the elements of the offense, the instructions of the trial court were deficient in that they failed to instruct the jury that, in order to convict, it was required to find a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist. He asserts that the court of appeals thus erred in not remanding the case for a new trial.

The court of appeals did not err in this respect. The pertinent portion of the trial court's charge to the jury was as follows (Tr. 319-321, 331-333):

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.

---

[4]See Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat 197; S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); 1968 U.S. Code Cong. and Adm. News, pp. 2112-2309.

First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms "built up" or assembled by the defendant, or caused to be built up or assembled by him;

Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;

The frequency of those transactions;

The purpose for which the firearm or ammunition was owned or possessed by the defendant;

The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.

A person who collects firearms for his own use or enjoyment and toward that purchase [sic] occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.

Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.

It is not necessary for the government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.

It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?

To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.

If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale.

In determining the sufficiency of jury instructions, it is necessary to view them as a whole. See, *e.g., United States* v. *Park*, No. 74-215, decided June 9, 1975. Here, when viewed in their entirety, the instructions were sufficient even under the stringent standard adopted by the court of appeals. The elements of willingness to deal and of the distinction between a business and a hobby are adequately covered, though not in the precise language subsequently used by the court of appeals. Moreover, the trial court's reference (Tr. 320) to "whether the defendant made a profit" properly alerted the jury to the presence of a profit motive as a relevant consideration.

In any event, in light of petitioner's failure to request an instruction on profit motive or to object to the instructions as given, as well as his failure to raise the issue on appeal, the trial court's instruction which was not plain error, does not merit further review. Fed. R. Crim. P., Rule 30.

3. Finally, petitioner argues (Pet. 15-19) that the evidence was insufficient in that no profit motive was proven. In support of this argument he points to a number of transactions in which he allegedly derived no profit. This contention, however, is meritless. The evidence fully established that petitioner engaged in these transactions for profit and was most likely succeeding in realizing one. This conclusion is strongly supported by the large number of customers and transactions involved. Those transactions included sales of firearms and sales of ammunition as well as the building up of firearms, and they took the form of both barter and sale for cash. Petitioner was known as someone who could get almost any quantity of .45 caliber pistols and ammunition, and others referred potential customers to him (Tr. 19). James Kirkwood told undercover agents that petitioner was his "source" of weapons (Tr. 120-121).

The evidence also established that the ammunition petitioner dealt in was of military origin (Tr. 201, 218-219, 245). The jury could infer that petitioner appropriated this ammunition and traded it for weapons, in which case he was clearly making a profit—*i.e.*, receiving valuable weapons in return for ammunition that cost him nothing. In one instance petitioner sold a weapon, received in exchange for ammunition, for $90.00 in cash (Tr. 173-174). The conclusion that petitioner was taking Marine Corps ammunition is further supported by petitioner's desire to get rid of the ammunition when he felt the "heat was on" (Tr. 83).

In short, the overwhelming weight of the evidence supports the conclusion that petitioner was not a mere hobbyist occasionally buying and selling guns, but rather he was engaged in a profit-seeking enterprise. See, *e.g.*, *United States* v. *Day, supra*; *United States* v. *Gross, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF

J. RONALD LYNCH,
HOWARD, STEVENS, LYNCH,
CAKE & HOWARD, P.C.
128 North Pitt Street
Alexandria, Virginia 22314
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX TO CONTENTS

	Page
OPINION BELOW AND JURISDICTION	1
QUESTIONS PRESENTED	1
RULES INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
ARGUMENT	7
A. Sgt. Huffman Made Sufficient Objection to the Instruction of the Trial Court Regarding What Constitutes "Dealing" To Comply with the Provisions of Rule 30 of the Federal Rules of Criminal Procedure	7
B. Even If Sgt. Huffman Did Not Make Sufficient Objection to the Trial Court's Instruction Regarding What Constitutes "Dealing", the Giving of That Instruction Was Plain Error Under Rule 52(b)	9
CONCLUSION	13

INDEX OF CASES

Screws v. *U. S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L. Ed. 1495 (1945)	10, 11
Stromberg v. *California*, 283 U.S. 359, 51 S.Ct. 5321, 75 L.Ed. 1117 (1931)	12
Terminiello v. *City of Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1137 (1949)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITIONER'S REPLY BRIEF

Calvin Eugene Huffman, Petitioner, submits this Reply Brief in support of his Petition for Writ of Certiorari to review the adjudgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 5, 1975.

OPINION BELOW AND JURISDICTION

The Opinion below is contained in the Appendix of Petitioner's Petition for Writ of Certiorari and the grounds for jurisdiction are cited in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

A. Did Sgt. Huffman make a sufficient objection to the instruction of the trial court regarding what

constitutes "dealing" to comply with the provisions of Rule 30 of the Federal Rules of Criminal Procedure?

B. If Sgt. Huffman did not make sufficient objection to the trial court's instruction regarding what constitutes "dealing", was the giving of that instruction "plain error" and reviewable under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure?

RULES INVOLVED

Rule 30
Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 32
Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

Subsequent to the STATEMENT OF THE CASE contained in the Petition for Writ of Certiorari, the United States filed a Memorandum in Opposition to the Petition for Certiorari asserting that Sgt. Huffman is barred from contending, that the Court of Appeals erred in not remanding the case for a new trial because its construction of Section 922(a)(1) contained different elements than the trial court's instruction, because Sgt. Huffman failed to object to the trial court's instruction in the manner required by Rule 30 of the Federal Rules of Criminal Procedure.

STATEMENT OF FACTS

Sgt. Huffman filed at the trial level a Motion to Dismiss the Indictment because Section 18 U.S.C. 922(a) was unconstitutionally vague as to what constituted "dealing" and argued the point at some length. (A. 70-80, 86-87, 92-95) [1] He further indicated to the court that he intended to offer a specific intent instruction to cure the vagueness of the statute. (A. 74-95). He did offer the court an instruction requiring the jury to find beyond a reasonable doubt, "that the defendant did intentionally, willfully and knowingly hold himself out to members of the public as a dealer in firearms and . . . intentionally, willfully, and knowingly engage in the business of dealing in firearms and ammunition . . ." (A. 96). The Court denied this instruction and outlined the instruction the Court did give on the elements of "dealing". (A. 55-56). When the Court had stated its proposed instruction, counsel for Sgt. Huffman stated, "Your Honor, for the record I don't

[1] A. is the Appendix submitted on appeal to the Circuit Court.

like to be repetitious, but does the court like for me to note an exception?", and the court replied, "No, you don't have to note exceptions in Federal court." (A. 56).

The court then instructed the jury outlining the elements of "dealing" in firearms as follows:

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.
>
> First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms 'built up' or assembled by the defendant, or caused to be built up or assembled by him;
>
> Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;
>
> The frequency of those transactions;
>
> The purpose for which the firearm or ammunition was owned or possessed by the defendant;
>
> The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.
>
> A person who collects firearms for his own use or enjoyment and toward that purchase occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.
>
> Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.
>
> It is not necessary for the government to prove any specific number of transactions. A person

> can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.
>
> It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?
>
> To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.
>
> If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale. (A. 63-67).

At the end of the court's instructions, Sgt. Huffman objected that his instructions were not given. (A. 74). The jury went out at 11:20 on July 24, 1974, and at 2:51 P.M. on that day, asked to be charged on what constituted the business of dealing in firearms. The jury deliberated that day until 6:12 P.M. without reaching a verdict and deliberated for approximately two hours on the following day before the guilty verdict was returned as to Huffman. (Tr. 331, 333, 336).

On appeal to the Fourth Circuit Court of Appeals, Sgt. Huffman again contended that 18 U.S.C. § 922(a) was unconstitutionally vague. (App.Br. 6-12). He specifically objected to the trial court's instruction as follows: "The thrust of the court's instruction in the present case is that what constitutes 'business of dealing in firearms' depends entirely upon the circumstances. It is not necessary that a profit be made or that the Government prove any special number of transactions. It appears to be a crime with a number

of elements, no one of which is necessary for conviction and no particular combination thereof is necessary for conviction.

"... The court involved could not define the conduct prohibited by the statute. How was Sgt. Huffman to know prohibited conduct?" (App.Br. 11).

The Court of Appeals held that to prove "dealing" in firearms, the U.S. must show "a willingness to deal, a profit motive, and a greater degree of activity than occasionally sales by a hobbyist." The court went on to state, "So construed, the statute is not vague as applied to Huffman." (App. 1a-3a).[2]

Sgt. Huffman contends in Reason B in his Petition for Certiorari that the Court of Appeals erred in not remanding the case for a new trial because the Court of Appeals construed the elements necessary to convict him differently from the instructions of the trial court. (Pet. 12-15). The government contends that question is not to be noticed because the Petitioner did not object to the trial court's instruction below or raise the matter on appeal as required by Rule 30 of the Federal Rules of Criminal Procedure. The government further contends that the giving of the instruction by the trial court, which conflicts with the Circuit Court's definition of dealing, is not plain error under the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

---

[2] App. is the Appendix attached to the Writ for Certiorari filed herein.

ARGUMENT

A. Sgt. Huffman Made Sufficient Objection To The Instruction Of The Trial Court Regarding What Constitutes "Dealing" To Comply With The Provisions Of Rule 30 Of The Federal Rules Of Criminal Procedure.

The trial court's instruction, as set forth in the Statement of Facts, does not have the necessary elements to constitute dealing and is as vague as the basic statute upon which it is clearly based. Construction of the basic statute by the Fourth Circuit clearly defines the three necessary elements of "dealing" and if Sgt. Huffman had been tried under instructions delineating these elements, he could not complain as to vagueness of the statute now. However, Sgt. Huffman, despite his efforts to point out vagueness problems involved, was tried under the trial court's vague instructions which closely followed the statute.

Sgt. Huffman filed a Motion to Dismiss the Indictment on the grounds of vagueness and repeatedly argued the point at a Motions hearing. (A. 78-80, 86-87, 92-95). He suggested to the trial court that construing § 18 U.S.C. 922 (a) to require specific intent would be a possible solution to the vagueness of the statute. (A. 94-95). Huffman offered an instruction which required a "holding out" as a dealer and a specific intent to deal which the trial court denied. (A. 96). He did object to the instruction given on what constitutes "dealing" when the court proposed it and did not give any detailed reasons as to his objection because the court stated no exceptions were necessary in Federal court. (A. 56). After the court instructed

the jury, Sgt. Huffman again objected that the instructions offered by him were not given. (A. 74).

Then, Huffman again raised the vagueness of the statute on appeal and specifically characterized the instruction of the trial court as being vague. (App.Br. 11).

Sgt. Huffman again and again objected to being tried under the vague standards of the statute and offered solutions to solve the vagueness.The trial court's instructions were in the terms of the statute and vague. Sgt. Huffman's objections had sufficiently pointed out this problem to comply with Rule 30. Sgt. Huffman did not request an instruction specifically containing the elements of dealing as construed by the Fourth Circuit, but Rule 40 does not require such perspicacity, it only requires a distinct objection.

Sgt. Huffman's approach was that construing the statute to require specific intent would cure the vagueness problem. The Court of Appeals did not choose to follow this approach and in view of their decision to narrow the construction of the statute, that does not appear to be error on the Court of Appeals' part. However, it is difficult to imagine that Sgt. Huffman would be held to predict the exact solution to the vagueness problem that the Fourth Circuit Court of Appeals would choose.

The decision of this court in *Screws* v. *U.S.*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) clearly shows that a possible solution to a vague statute is that the statute be construed to require specific intent. Sgt. Huffman chose to suggest to the trial court that method which while not required would have solved the vagueness problem in the present case. The trial court chose not to make any effort narrowing the construction of

the statute, despite Sgt. Huffman's efforts to point out that the statute was vague. Sgt. Huffman did comply with Rule 30 in this case.

B. Even If Sgt. Huffman Did Not Make Sufficient Objection To The Trial Court's Instruction Regarding What Constitutes "Dealing", The Giving Of That Instruction Was Plain Error Under Rule 52(b).

The instruction given by the trial court violates the basic elemental rights guaranteed to every defendant. Every defendant is entitled to have the jury pass on the elements of the crime involved and find him guilty of all those elements beyond a reasonable doubt. This proposition is too basically entrenched in our judicial system to even require the cites of authorities.

In the present case the trial court instructed the jury, beginning with the following phrase, "In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling." (A. 63-64). The trial court then went on to list several factors which the jury could take into account. The Court of Appeals defined the elements of dealing to be as follows: "it *must* show a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist.

"So construed, the statute is not value as applied to Huffman." The conflict between the approaches of the two courts is obvious. The trial court has listed several items which the jury *may* take into account and the Appeals Court has clearly established three elements that constitute the crime of "dealing" in firearms that *must* be found beyond a reasonable doubt

before Huffman could be found guilty. Huffman was not allowed a trial on these elements of the crime. The Court of Appeals obviously construed § 18 U.S.C. 922 (a) in such a way as to save it from unconstitutional vagueness by ruling that dealing was comprised of three definite elements, as set forth above.

This is exactly the same situation as occurred in *Screws* v. *U.S.*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945). The case involved a violation of 18 U.S.C. 88, § 20 which made criminal *wilfully depriving another of his Civil rights.* The defendant had been convicted under that statute. He appealed claiming that the statute was unconstitutionally vague. In order to keep from holding the statute unconstitutionally vague this court construed *wilfully* so as to require specific intent.

The situation is exactly the same as we have in the present case. The Court of Appeals in the present case has construed "dealing" to have three definite elements in order to keep from finding it unconstitutionally vague as did the court in *Screws.*

At 325 U.S. 106-107, the Court in *Screws* stated as follows: "The difficulty here is that this question of intent was not properly submitted to the jury with proper instructions. The court charged the Petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's alleged assault. But in view of our construction of the word 'wilfully' the jury should have been further instructed that it was not sufficient that Petitioners had a generally bad purpose. To convict it was necessary for them to find that Petitioners had the purpose to

deprive the prisoner of a Constitutional right, e.g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury could be entitled to consider all the attendant circumstances—the malice of the Petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

"It is true that no exception was taken to the trial court's charge. Normally we would under these circumstances not take note of the error. . . . But there are exceptions to that rule. . . . And where the error is so fundamental as to not submit to the jury the essential ingredients of the only offense on which conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous of offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried with the standards of guilt which Congress has prescribed."

In the present case, as in the *Screws* case, the defendant has been deprived of the trial by an error so fundamental so as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest. The only elements upon which the conviction for dealing could rest were defined by the Fourth Circuit after Sgt. Huffman had been tried and the jury was not instructed that these ingredients were essential or even necessary to convict him. The *Screws* case clearly indicates that an error so fundamental is not waived by the failure to object.

The *Screws* case is controlling authority, not only that an objection is not necessary and that the trial court's instruction is plain error under Rule 52(b),

but also is controlling authority that the Court of Appeals erred in not remanding the case for a new trial.

The cases of *Terminiello* v. *City of Chicago,* 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1137 (1949) and *Stromberg* v. *California,* 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) are also authorities controlling the present case. In those cases, the defendant had attacked a statute as unconstitutionally vague. In neither one of those cases had the defendant objected to an instruction based on the unconstitutionally vague statute at his trial. The Courts held that the defendant was not precluded from raising the vagueness of the statute by his failure to object to the instruction and found the statute unconstitutionally vague and reversed the convictions in both cases. Like the defendants in *Terminiello* and *Stromberg,* Sgt. Huffman has attacked the statute in the present case in the grounds of vagueness. The clear implication of the Fourt Circuit opinion is that the construction applied to Sgt. Huffman at trial was unconstitutionally vague and thus Sgt. Huffman is in the same position as the defendants in *Terminiello* and *Stromberg.* In *Terminiello* at 337 U.S. 5, the Court said, "The fact that Petitioner took no exception to the instruction is immaterial. No exception to the instructions was taken in *Stromberg* v. *California.* . . . The statute had been challenged as unconstitutional, and the instruction was framed in this language. . . . The principle of that case controls this one."

As the above language from the *Terminiello* case clearly shows when the basic point raised is vagueness of the statute, the instructions given by the court based upon that statute need not be challenged to

allow the point to be raised in the Appellate Courts. That is the exact situation we have in the present case.

All the cases cited clearly dictate that the error involved in the present case is of such a substantial nature that it is plain error as that term is used in Rule 52(b) and may be noticed by the court whether or not a sufficient objection was raised below.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted for the reasons stated in the Petition for Writ of Certiorari and for the reasons set forth above in Petitioner's Reply Brief.

J. RONALD LYNCH
HOWARD, STEVENS, LYNCH,
CAKE & HOWARD, P. C.
128 North Pitt Street
Alexandria, Virginia 22314

Counsel for Petitioner